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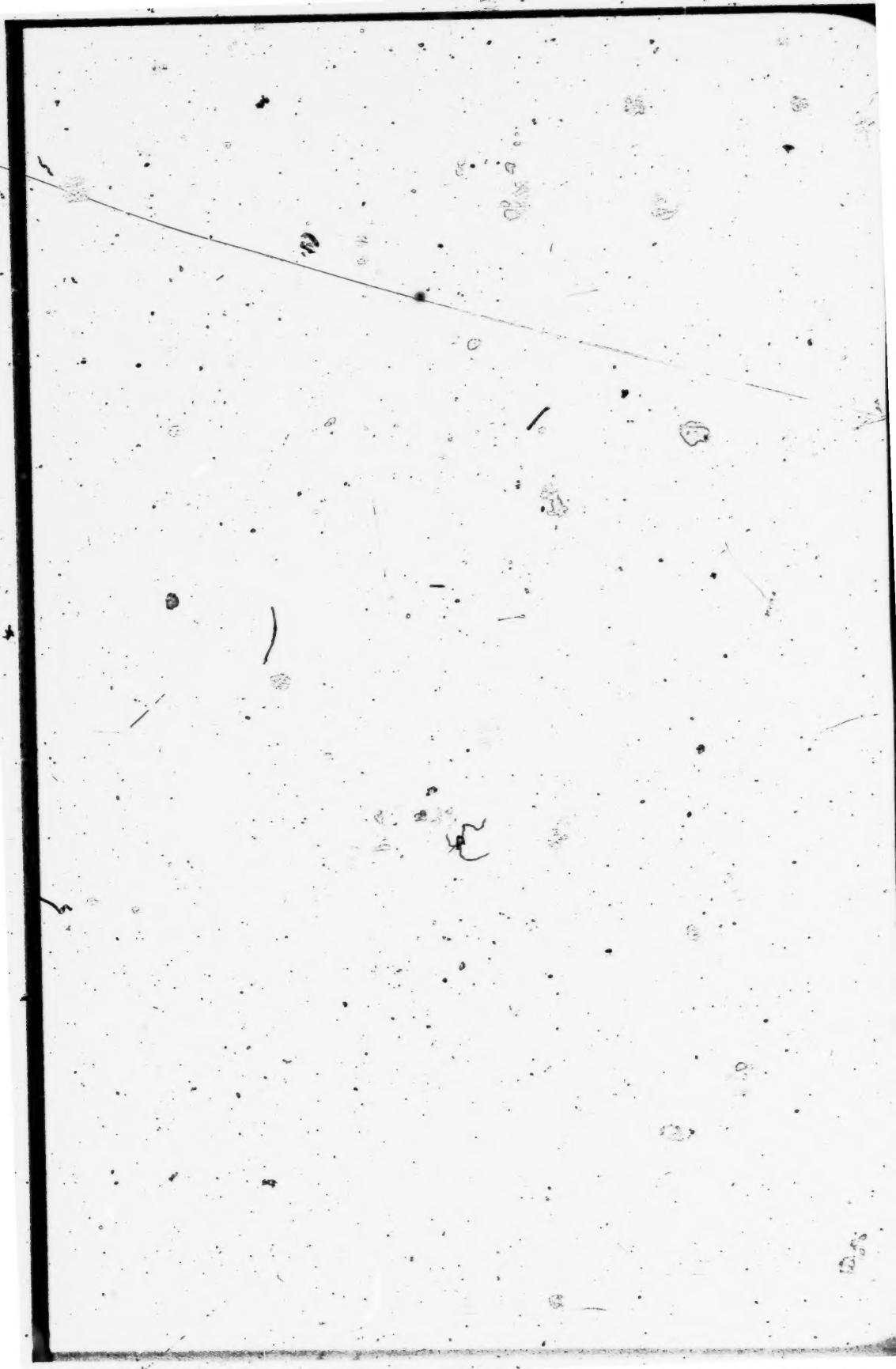

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 88

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

In support of his contention that the word "willfully" in Section 1114 (a) of the Revenue Act of 1926, and Section 146 (a) of the Revenue Act of 1928, shows that Congress intended to punish only those persons who deliberately, intentionally and with bad motive fail or refuse to give information to an Internal Revenue Agent, respondent cites and relies upon *Potter* v. *United States*, 155 U.S. 438 (Br. 21–22), and contends that this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, does not apply. (Br. 27–28.)

The *Potter* case arose under Section 5208 of the Revised Statutes and Section 13 of the Act of July 12, 1882, c. 290, 22 Stat. 162, 166. Those statutes when read together make it a crime for an officer of a national bank to "willfully" certify any check drawn upon the bank, unless the person or company drawing the check has on deposit with the bank at the time such check is certified an amount of money equal to the amount specified in such check. The indictment charged (pp. 440–441) that Potter did "unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association" for a specified amount by certain named persons who "did not then and there, * * * have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check." Thus, under the statute and the indictment it was essential that the Government not only prove the certification of the check and that there was no money on deposit to meet it, but that Potter knew that the amount on deposit was insufficient. On the trial the books of the bank were introduced in evidence showing that at the time the check was drawn and certified the account was overdrawn. This evidence doubtless authorized an inference of knowledge on the part of Potter. However, to rebut that inference he offered to prove an oral agreement to the effect that overdrafts issued by the parties involved would be con-

sidered a loan. This evidence was excluded. With relation to the exclusion, this Court said (p. 447):

> The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and that such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith supposed that this arrangement was the equivalent of a loan by note, and that the indebtedness of Evans & Co. was fully secured by collateral, it seems to us that the jury would have a right to be informed of the fact as bearing upon the question whether he had "wilfully" violated the statute.

The excluded evidence indicated a mistake of fact. It indicated that Potter thought that there was money in the account. It is well established that one who acts under a mistake of fact acts neither wilfully nor knowingly. See *Felton* v. *United States,* 96 U.S. 699, 702–703; *Spurr* v. *United States,* 174 U.S. 728, 733. However, there is no suggestion that Murdock acted under a mistake of fact. His mistake, if any, was one of law, and it is well settled that a mistake of law constitutes no defense. *Sinclair* v. *United States,* 279 U.S. 263, 299; *Agnew* v. *United States,* 165 U.S. 36, 53; *Armour Packing Co.* v. *United States,* 209 U.S. 56, 86; *Chicago, St. P., M. & O. Ry Co.* v.

United States, 162 Fed. 835, 842 (C.C.A. 8th), certiorari denied, 212 U.S. 579; *Chadwick* v. *United States,* 141 Fed. 225, 243 (C.C.A. 6th).

In *Agnew* v. *United States, supra,* Agnew was indicted under Section 5209 R.S. for having *misapplied* the moneys of a national bank (pp. 38–39). Section 5209 provides that:

> Every president, director, cashier, teller, clerk or agent of any association, who * * * *wilfully* misapplies any of the moneys * * * of the association * * *. (Italics ours.)

shall be guilty of a misdemeanor. Upon the trial the court instructed the jury that (p. 53):

> *The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent.* The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. *It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action.* If, however, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or wilfully misapplied by the accused and converted to his own use, whereby, as

> a necessary, natural or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed. (Italics ours.)

This Court held (p. 53) that the instruction "was unexceptionable as matter of law."

In *Armour Packing Co.* v. *United States, supra,* the petitioner was convicted for violation of the Act of February 19, 1903, c. 708, 32 Stat. 847 (commonly called the Elkins Act), in obtaining unlawful concessions from the Chicago, Burlington and Quincy Railway Company. In this Court it contended (p. 85):

> that there is nothing in the facts found in this case to show any intentional violation of the law; that on the contrary the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the Interstate Commerce Act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case.

With respect to such contention, this Court said (p. 85):

> While intent is in a certain sense essential to the commission of a crime, and in some

> classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, *where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong.* * * * (P. 86.) *The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required.* * * * *A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles. Reynolds* v. *United States*, 98 U.S. 145. (Italics ours.)

A similar position was taken by the Circuit Court of Appeals for the Eighth Circuit in *Chicago, St. P., M. & O. Ry. Co.* v. *United States, supra*, where in considering a similar question to that involved in the above case, the court said (p. 842):

> This argument, when made, impressed us strongly. It seemed contrary to natural justice and in conflict with the fundamental principle underlying the administration of criminal law as recognized by the Supreme Court in the foregoing cases to punish parties who had reason to believe and did honestly believe that what they did was lawful and right. *This, however, seemed doubtful and dangerous doctrine, and commanded our*

most serious consideration. In most cases the evil mind or bad intent accompanies the doing of a wrongful act, and no difficulty arises in the disposition of a case involving an offense malum in se. *It is only when an offense malum prohibitum is charged that the application of the general doctrine becomes doubtful. To hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous criterion. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them. In view of considerations like these the general doctrine alluded to has been modified in its application to statutory offenses.* (Italics ours.)

In *Chadwick* v. *United States, supra,* upon a trial for conspiring with the officers of a bank to certify checks without adequate funds being in the bank, the defendant requested the court to instruct the jury that (p. 242):

> The defendant was not bound to know the rules of the bank or the law governing the officers of the bank with reference to certifying checks, and in the absence of such knowledge she could not be held to have conspired with the officers of the bank, if what she did was done in good faith, and without any criminal intention to do the unlawful act complained of.

In rejecting such request, the trial court in part said (p. 243):

> The only question for you to pass upon is whether the defendant violated the law; *not whether she had any knowledge that she was violating the law.* (Italics ours.)

The Circuit Court of Appeals in sustaining the charge said (p. 243):

> Knowledge that the act which it was the object of the conspiracy to do would be in violation of the law is imputed and need not be proven.

Respondent cites no case supporting his position that a mistake of law constitutes a defense in a criminal case, and we have found none. We submit that his position is fallacious.

~~Petitioner~~ Respondent attempts to distinguish this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, from the instant case on two grounds: (1) that the statute under which Sinclair was prosecuted did not make wilfulness an ingredient of the offense (Br. 28), and (2) that Sinclair did not claim immunity under the Constitution, as did respondent, but merely challenged the jurisdiction and power of the committee of the Senate before which he was called. (Br. 27.)

As to the first distinction, while the statute involved in the *Sinclair* case did not expressly use the word "willfully," nevertheless the words "willfully" and "knowingly" will be implied. *Baender* v. *Barnett*, 255 U.S. 224, 226.

As to the second distinction, we submit that no difference in principle is involved. If the committee in the *Sinclair* case was without jurisdiction to require Sinclair to answer, he was justified in refusing just as much as Murdock would have been had he been protected by the Constitution. Both made a mistake as to the law, and, as we have stated above, such mistake constitutes no defense.

II

Respondent
~~Petitioner~~ complains of that part of the court's charge to the jury wherein the court told the jury that it felt that the evidence established the defendant's guilt. (Br. 30.) The excerpt quoted by respondent lends an erroneous picture. The court told the jury (R. 48):

> So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt. If you don't think so, then you should find him not guilty. That is your privilege. If you do think so, then that is the end of the case and your verdict will be one of not[1] guilty.

[1] The court meant "guilty" instead of "not guilty" and it made correction accordingly. (R. 49.)

It will be observed that when read as a whole the instruction was not improper (*Horning* v. *District of Columbia,* 254 U.S. 135) and the Circuit Court of Appeals so held (R. 61). However, its opinion tends to confuse this issue with that as to whether the jury in determining the question of wilfulness should have taken into consideration the fact that the defendant acted upon the advice of counsel. Obviously, the two questions are not related. Either the court had a right to express an opinion or it did not; and either the fact that the defendant acted upon the advice of counsel had a bearing upon the wilfulness with which he acted, or it did not. There is no justification for intermingling the two issues.

Respectfully submitted.

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NOVEMBER 1933.

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